whether that interest is genuinely important for First Amendment purposes. See, e.g., Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981); Schad, 452 U.S. at 73 n.14. The must carry/retransmission scheme, we submit, demonstrates that the only interests being "preserved" here are those of the broadcasters.

b. The Requirements Themselves are Substantially Broader than is Essential to further the Government's Purported Interests

The sweep of the rules, by itself, dooms them under any First Amendment standard of review. The lack of fit between rules and interests asserted to justify them reinforces the conclusion that the new statute's requirements impermissibly promote local broadcasters rather than localism in broadcasting. The grossly overinclusive nature of the rules is well illustrated by their failure to require locally-originated programming, by the fact that the rules Congress endorsed are broader without explanation than those found unconstitutional in Century, and by their substantial expansion by the addition of the retransmission consent option.

(1) Local Programming

The rules would require a cable system to transmit the signals of local commercial television stations and qualified low power television stations, without regard to the quantity of local programming originated and produced by those stations and without regard to the quantity of local programming originated and produced by the cable system. In fact, the Conference Committee deleted a requirement that low power stations carry any locally originated and produced programming to qualify for cable system carriage. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 74 (1992). As noted above, the 1992 Cable Act compels cable systems with more than twelve channels to fill up to one-third of their channel capacity with commercial broadcast station signals. 1992 Cable Act § 4(b)(1)(B). In the case of some cable systems, the one-third "ceiling" may mandate the carriage of twenty or more commercial broadcast stations.

This indifference to actual local programming is impossible to reconcile with Congress's claimed interest in preserving local broadcasting. In fact, it was this complete indifference that fatally undermined the must carry rules invalidated in Quincy:

> The rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station . . . is entitled to carriage even if it carries no local programming at all.
>
> * * *
>
> It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences.

768 F.2d at 1460-61.

The lack of focus on actual local programming is perhaps explained by the fact that broadcast stations have substantially reduced the local programming they offer. According to the FCC's own factfinding, broadcast stations now devote only a small percentage of total expenditures to local programming. Broadcast Television Report at 45. A recent study further substantiates that broadcast stations are choosing to offer less and less locally-originated programming.[79]

In contrast to this dramatic decline in local broadcast programming is an equally dramatic growth of news and public affairs programming offered by cable networks and cable operators. Cable subscribers now receive a wealth of news, financial, and other informational services offered by CNN, CNBC, among other cable networks. Cable systems now provide coverage of Congressional deliberations through the C-SPAN channels. BET and The Family Channel,

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[79] Office of Communications of the United Church of Christ, The Public Cost of TV Deregulation: A Study of the Decline of Informational Programming on Commercial TV (June 17, 1991).

among others, offer religious and minority-oriented programming. Further, cable systems have launched 24-hour per day news channels devoted to local news and public affairs programming, such as Newschannel 8 offered on Washington, D.C. area cable systems, and News 12 Long Island offered by cable systems serving Long Island, New York.

(2) Breadth of the Rules

The new must carry provisions are even less narrowly tailored than the interim must carry rules that were invalidated in Century. First, the one-third "ceiling" on the number of commercial broadcast stations that a cable system is required to carry exceeds the one-quarter ceiling contained in the rules struck down in Century. Congress provides no explanation for choosing one percentage or another. Second, the geographic area in which stations can obtain mandatory cable system carriage is broader than that mandated in the rules invalidated in Quincy and Century. Congress provides no explanation for this expansion. Third, unlike the Century rules, the 1992 Cable Act contains no minimum viewership standard at all for cable system carriage, thereby completely disregarding the viewing preferences of cable subscribers, whose interests are "paramount." Congress provides no explanation for this deletion of a consumer voice in a purportedly pro-consumer statute.

(3) Retransmission Consent

The Act's scheme granting each commercial broadcaster the right to seek must carry, or to withhold carriage unless the cable operator pays the broadcaster, further demonstrates the lack of tailoring in the scheme. By providing the option to the most popular broadcast stations, undoubtedly the ones that also contain much of the local programming presence, to opt-out of the must carry regime, Sections 4 and 5 in practical effect will ensure that all broadcasters will obtain carriage. Coupled with the fact that there is no viewership eligibility standard, it can be assumed that each broadcaster obtains protection under these provisions. Furthermore, by providing broadcasters with the stacked deck of being able to select must carry or retransmission consent, broadcasters will be able to maximize their economic gains at the expense of the First Amendment rights of cable networks and operators.

c. The Channel Position Requirements are Particularly Protectionist

Perhaps the clearest illustration of the protectionist aspects of the rules are the channel positioning requirements. See 1992 Cable Act §§ 4(b)(6) & 5(g)(5). By mandating not only which signals must be carried, but also where they must be carried, the 1992 Cable Act channel position provisions further foreclose access of cable networks to desirable cable system channels in violation of the First Amendment.

The legislative history underlying the channel position requirements only reinforces the point. To the extent channel positioning has competitive consequences for broadcasters, S. Rep. No. 92 at 43-44, 61; H.R. Rep. No. 628 at 54-56, the same must be true for cable networks. In fact, the harm to cable networks must be even more substantial because their only real avenue to the public is through non-broadcast transmission media, such as cable television. Quincy, 768 F.2d at 1445.

While subscriber preference is "paramount" under the First Amendment, Red Lion, 395 U.S. at 390, the 1992 Cable Act channel position requirements completely override viewer preference by dictating where particular signals may be carried. Broadcasters are given the option of reclaiming the channel positions they had in 1985, even if they do not correspond to their over-the-air assignment. The provisions are as likely to impede than to foster competition; they represent improper and unsustainable protectionism at its worst.

For example, CNN is currently carried in the Howard County, Maryland cable system on

Channel 12. WDCA, Channel 20 in Washington, is carried on Channel 20 on the system. Under the channel positioning provisions of the Act, WDCA has the governmental-granted right to reclaim Channel 12 if it desires to displace CNN.[80] There is no governmental interest that can justify the encroachment on the cable operator's editorial discretion or justify the elevation of WDCA's speech rights over those of CNN.

C. The Retransmission Consent Provisions are Integrally Related to Must Carry and Must Also Fall

As the foregoing establishes, the 1992 Cable Act must carry and channel positioning provisions infringe the First Amendment rights of cable network programmers, cable system operators, and the public. Because those unconstitutional provisions are inextricably linked with the Act's retransmission consent provisions, this Court must also invalidate Section 6.

The Supreme Court has instructed that notwithstanding the presence of a severability clause, a provision must be invalidated as unseverable from other, unconstitutional provisions of the statute if "the statute created in its absence is legislation that Congress would not have enacted." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).[81] Of particular significance is whether the statute, absent the severed provision, "will function in a manner consistent with the intent of Congress." Id. Here, the intent of Congress is clear. Because must carry and retransmission consent were enacted as an "either/or" proposition, Congress did not intend for retransmission consent to operate absent must carry. There is no evidence that Congress would have created retransmission consent alone.

[80] McGuirk Affidavit ¶ 33.

[81] While Section 708 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 608, provides for the severance of invalid provisions of that Act, such a provision merely creates a presumption of severability, rebuttable by proof of Congress's contrary intent. Alaska Airlines, Inc., 480 U.S. at 686.

Must carry and retransmission consent operate as a package to provide a broadcaster with a choice: it may either negotiate consent for the cable retransmission of its signal or it may demand mandatory cable carriage.[82] Indeed, they are expressly linked -- if a broadcast station elects to exercise its right of retransmission consent, "the [must carry] provisions of section [4] shall not apply . . . ." Id. § 6(A), 47 U.S.C. § 325(b)(4). Stations may elect to exercise the right of retransmission consent every three years; however, a station that elects to exercise that right gives up its rights under the must carry provisions for the duration of the three-year period. Id. § 6(A), 47 U.S.C. § 325(b)(3)(B). By establishing two interrelated means for cable carriage of broadcast stations, Congress can only have intended those provisions to operate together. See FCC v. Midwest Video Corp., 440 U.S. at 708 n.18.

The legislative history further compels the conclusion that Congress did not intend to establish a right of retransmission consent in the absence of a mandatory carriage obligation. Although both the House and Senate versions of the legislation contained must carry requirements, only the Senate bill contained the retransmission consent provision.[83] Where only one house of Congress considered the retransmission consent provisions, and then only in tandem with the must carry and channel positioning requirements, it defies logic to conclude that

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[82] 1992 Cable Act § 6(A), 47 U.S.C. § 325 (b)(1). While the Act requires the FCC to conduct a rulemaking to determine the terms by which retransmission consent may be negotiated, 1992 Cable Act § 6(A), 47 U.S.C. § 325(b)(3), the outcome of that rulemaking is irrelevant to the resolution of the severability issue. The terms the FCC may establish cannot alter the critical fact that broadcasters are accorded a right of retransmission consent by the 1992 Cable Act. For the same reason, the delayed effective date of the retransmission consent provision is also irrelevant. See 1992 Cable Act § 6(A), 47 U.S.C. § 325(b)(1) (making the retransmission consent provisions effective one year after the date of enactment of the Act).

[83] See H.R. Conf. Rep. No. 862 at 75-76. The fact that the retransmission consent provision was not included in the Senate bill until the full Senate Commerce Committee markup casts significant doubt on the proposition that Congress would have enacted the retransmission consent provision had it known that the must carry provisions would be invalidated. See 138 Cong. Rec. S639 (daily ed. Jan. 30, 1992) (statement of Sen. Seymour).

Congress intended for those provisions to stand alone following the invalidation of the mandatory carriage requirements.[84]

Finally, examination of Congress's asserted interests conclusively proves the interconnection and inseverability of the must carry, channel positioning, and retransmission consent provisions. As demonstrated above, the retransmission consent provisions only benefit the most successful broadcast stations because it is only they who generate sufficient audience demand to compel payment from cable operators for the retransmission of their signals. In addition, only commercial stations are accorded the right of retransmission consent. 1992 Cable Act § 6(A), 47 U.S.C. § 325(b)(2)(A). It would be ironic indeed to leave in place that which bestows an additional government benefit solely to those stations that need it the least. A Cable Act with retransmission consent alone does not "function in a manner consistent" with Congress's intent, Alaska Airlines, 480 U.S. at 685, and cannot stand.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION DOES NOT ISSUE

It is well-established that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."[85] Such irreparable injury is

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[84] Moreover, the Committee Reports provide a wealth of additional evidence that Congress did not intend for the retransmission consent provisions to operate alone but as part of must carry. First, Congress intended that cable carriage of a station exercising its right of retransmission consent count towards the number of stations that a cable system is required to carry under the must carry provisions. S. Rep. No. 92 at 37-38. Second, a station that seeks but is denied carriage pursuant to the must carry provisions should be able to reassert its right of retransmission consent. Id. at 38. Third, a station negotiating for retransmission should not be permitted to obtain a channel position to which another station is entitled under the must carry and channel position provisions. H.R. Conf. Rep. No. 862 at 76.

[85] Elrod v. Burns, 427 U.S. 347, 373 (1976). See also Nat'l Treasury Employees Union v. United States, 927 F.2d 1253, 1254 (D.C. Cir. 1991); Branch v. FCC, 824 F.2d 37, 40 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988); Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991); In re School Asbestos Litigation, 842 F.2d 671, 679 (3d Cir. 1988); Jacobsen v.
(continued...)

precisely what is at issue in this case.

If the challenged provisions of the 1992 Cable Act are permitted to take effect, broadcast stations -- which already possess free access to the airwaves to convey their programming to the public -- immediately will have statutory rights to bump existing cable programming presently being carried on cable systems.[86] Cable networks whose programming is eliminated from a cable system will be left without any means of reaching that audience. In other circumstances, by virtue of the federal mandate, cable networks will have their programming repositioned to less-watched, less-desirable channels, thereby reducing the size of their audiences solely to benefit particular broadcasters. In accordance with the foregoing authorities, there can be no dispute that these infringements upon the First Amendment rights of cable programmers -- even for a "minimal amount of time" -- constitute irreparable injury.

In addition, the Act's interference with the editorial discretion of cable operators constitutes an infringement upon fundamental First Amendment rights, which also "unquestionably constitutes irreparable injury." Elrod, 427 U.S. at 373. And, to the extent the

[85](...continued)
United States Postal Service, 812 F.2d 1151, 1154 (9th Cir. 1987); Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987); Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978) ("[v]iolations of First Amendment rights constitute per se irreparable injury."); Stewart v. District of Columbia Armory Bd., 789 F. Supp. 402, 406 (D.D.C. 1992); Nat'l Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. 430, 437-38 (D.D.C. 1992); Student Press Law Center v. Alexander, 778 F. Supp. 1227, 1234 (D.D.C. 1991); Waters v. Barry, 711 F. Supp. 1121, 1123 (D.D.C. 1989).

[86] Although Section 4(f) provides that the Commission shall, 180 days after the date of enactment, "issue regulations implementing the requirements imposed by this section," on their face the carriage and channel positioning requirements of the Act are self-executing. See, e.g., Sections 4(a), 4(b)(1) - (3); 5(a), 5(b)(1) - (2) (cable operators "shall carry" specified broadcast programming); Sections 4(b)(6), 5(g)(5) (broadcast programming required to be carried under the Act "shall be carried" on specified channel positions). Section 5 does not specifically provide for implementing regulations. It must be assumed, of course, that cable operators will comply with the Act.

exercise by broadcasters of their rights under the statute thwarts viewer preferences, cable subscribers will also be irreparably harmed as a result. See Student Press Law Center v. Alexander, 778 F. Supp. at 1234 ("The Supreme Court has noted in a variety of contexts that the First Amendment 'protects the right to receive information and ideas.'") (citations omitted).

III. NO SIGNIFICANT HARM WILL RESULT TO OTHER PARTIES IF PRELIMINARY RELIEF IS GRANTED DURING THE MINIMAL TIME REQUIRED FOR CONSIDERATION ON THE MERITS

As noted at the outset, the issuance of a preliminary injunction in this case would do no more than maintain the status quo during whatever period that may be required for a determination on the merits of the "serious First Amendment questions"[87] raised herein. Granting plaintiffs' motion under these circumstances is entirely appropriate.[88]

It cannot credibly be maintained that any appreciable harm to the government's purported interest in "preserving" local broadcasting would result from a short postponement of the effective date of the challenged provisions. In view of the absence of "must carry" rules since July 1985 and the lack of any findings of urgency by Congress regarding the need for such

[87] See Exhibit B hereto.

[88] See University of Texas v. Camenisch, 451 U.S. 390, 395 (1981); Friends for All Children v. Lockheed Aircraft Corp., 746 F.2d 816, 830 & n.21 (D.C. Cir. 1984) (purpose of a preliminary injunction "is to preserve the status quo until, upon final hearing, the Court may grant full relief."); Jacobsen v. United States Postal Service, 812 F.2d 1151, 1154 (9th Cir. 1987) (preliminary injunction appropriate where plaintiff, asserting denial of First Amendment rights, raised "a serious question of constitutional dimensions"). See also Reynolds v. Sheet Metal Workers, Local 102, 702 F.2d 221, 226 (D.C. Cir. 1983) ("The traditions of equity grant a trial court substantial discretion to determine whether the status quo should be maintained to prevent irreparable injury to litigants pending final adjudication of a case on the merits."); Nat'l Ass'n of Farm Workers Orgs. v. Marshall, 628 F.2d 604, 613 (D.C. Cir. 1980); District 50, United Mine Workers of America v. Int'l Union, United Mine Workers of America, 412 F.2d 165, 168 (D.C. Cir. 1969); Nat'l Treasury Employees Union v. Watkins, 722 F. Supp. 766, 771 (D.D.C. 1989) (public interest "will be well served by maintaining the status quo"); Kelbe Corp. v. Hall, 789 F. Supp. 241, 243 (S.D. Ohio 1992).

legislation,[89] any contention by the government that significant harm would result as a consequence of a delay in implementation pending a resolution of the merits would be frivolous.

Nor can it credibly be argued that broadcasters -- concededly, the Act's intended beneficiaries -- would suffer any cognizable injury as a result of a brief postponement in implementing the legislation. Broadcasters would remain in exactly the same competitive position they have been since July 1985. As noted above, broadcasters -- unlike cable programmers -- already possess an entirely separate, cost-free means of conveying their programming to viewers within their broadcast areas. Given that cable programmers would be deprived of their only means of reaching their intended audiences and that such infringement of their First Amendment rights, the courts have made clear, constitutes irreparable injury, the balance of equities plainly weighs in favor of maintaining the status quo pending resolution of the important First Amendment issues raised in this litigation.

Finally, in addition to the irreparable harm to cable operators resulting from the Act's far-reaching intrusions into constitutionally-protected editorial discretion, the affairs of cable operators would be highly -- and needlessly -- disrupted if the carriage and channel positioning provisions of the Act were allowed to become effective only to be struck down shortly thereafter. A potentially vast reshuffling of programming, together with the accompanying turmoil regarding what stations get carried, on what channels and on what terms, clearly would disrupt operations and be highly confusing to cable subscribers.

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[89] Indeed, Congress acknowledged that no imminent threat to local broadcasting exists. See, e.g., H.R. Rep. No. 628 at 52 (noting that the Committee "has not found that cable systems are engaging in a widespread pattern of denying carriage").

IV. THE PUBLIC INTEREST FAVORS THE ISSUANCE OF A PRELIMINARY INJUNCTION

In this case, the public interest heavily weighs in favor of the issuance of a preliminary injunction for at least two reasons. First, as this Court stated recently, "the public interest is most decidedly served by preservation of constitutional values. . . ."[90] Especially where, as here, there is no dispute that the challenged provisions will in fact restrict activities covered by the First Amendment,[91] consideration of the public interest supports granting preliminary relief maintaining the status quo.

Second, as noted above, cable subscribers will be ill-served indeed if the challenged provisions are allowed to take effect and subsequently struck down. Through no fault of cable operators, such a course of events could severely disrupt service to subscribers, the improvement of which Congress identified as the purpose of other provisions in the legislation, making customers less -- not more -- satisfied with their cable systems. See 1992 Cable Act §§ 2(a)(20), 8. Such disruption would also disserve the public interest by causing consumers to question further whether Congress is capable at all of addressing their problems without simply making matters worse.

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[90] Nat'l Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. at 437-38 (granting preliminary injunction where First Amendment rights appeared threatened). Accord Stewart v. District of Columbia Armory Board, 789 F. Supp. at 406 ("[T]he public clearly has an interest in free speech. The public interest in this case will be served by ensuring that plaintiffs' First Amendment rights are not infringed before the constitutionality of the regulation has been definitively determined.") See also Waters v. Barry, 711 F. Supp. at 1124 ("[T]he public interest favors reasoned, thorough judicial consideration of laws that may intrude upon constitutional interests. It opposes the hasty enforcement of legislation which may suffer from constitutional infirmities.").

[91] There is no question that the Act restricts dissemination of constitutionally-protected cable programming and limits the similarly protected editorial discretion of cable operators. See H.R. Rep. No. 628 at 60-61. Rather, the dispute centers on whether such restrictions further sufficiently compelling government interests, and/or whether the means selected are sufficiently narrow, to justify these impingements on core First Amendment activities.

CONCLUSION

The must carry statute is punitive, protectionist, unjustified and, most importantly, unconstitutional. Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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Dated: November 5, 1992
D10589.1

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November 1992, I caused copies of the foregoing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, with exhibits, to be served by hand on each of the following:

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THE WHITE HOUSE

Office of the Press Secretary

(Ft. Lauderdale, Florida)

For Immediate Release October 3, 1992

TO THE SENATE OF THE UNITED STATES:

I am returning herewith without my approval S. 12, the "Cable Television Consumer Protection and Competition Act of 1992." This bill illustrates good intentions gone wrong, fallen prey to special interests.

Contrary to the claims made by its proponents, this legislation will not reduce the price Americans pay for cable television service. Rather, the simple truth is that under this legislation cable television rates will go up, not down. Competition will not increase, it will stagnate. In addition, this legislation will cost American jobs and discourage investment in telecommunications, one of our fastest growing industries.

S. 12 is clearly long on promises. Unfortunately, it is just as clearly short on relief to the American families who are quite rightly concerned about significant increases in their cable rates and poor cable service. Although the proponents of S. 12 describe the bill as procompetitive, it simply is not. Indeed, the only truly competitive provision, one that would have expanded the ability of telephone companies to compete with cable companies in rural areas, was dropped from the bill at the last minute.

S. 12 tries to address legitimate consumer concerns, but it does so by requiring cable companies to bear the costs of meeting major new federally imposed regulatory requirements and by adopting costly special interest provisions. For example, the bill requires cable companies for the first time to pay broadcasting companies, who have free access to the airwaves, to carry the broadcasters' programs. The undeniable result: higher rates for cable viewers.

Beyond increasing consumer costs, the bill takes certain key business decisions away from cable operators and puts them in the hands of the Federal Government. One provision, which is unconstitutional, requires cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations. Another special interest provision would put the Federal Government in the position of dictating to cable companies to whom and at what price they could sell their programs. These types of federally mandated outcomes will discourage continued investment in new programs to the detriment of cable subscribers who have come to expect a wide variety of programming and new services.

I believe that the American people deserve cable television legislation that, unlike S. 12, will deliver what it promises: fair rates, good programming, and sound service.

GEORGE BUSH

THE WHITE HOUSE,
October 3, 1992.

# # #

EXHIBIT A - CIVIL ACTION NO. 92-2247

B

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

April 1, 1992

Honorable Edward J. Markey
Chairman, Subcommittee on
Telecommunications and Finance
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We are writing to inform you of the Administration's views on your draft cable television bill, which the subcommittee has scheduled for markup today.

The Administration has strongly opposed proposals to re-regulate the cable television industry considered by Congress in recent years, including S. 12, which passed the Senate in January 1992, and H.R. 5267, which passed the House in September 1990. The new draft bill includes numerous proposals similar to those that the Administration opposed in these past bills. Therefore, if the bill were presented to the President in its current form, the Attorney General, the Secretary of Commerce, and the President's other senior advisers would recommend a veto.

Our principal objection to the draft bill is that, like its predecessors, it does not sufficiently emphasize competitive principles in addressing perceived problems in the cable television industry. It has been the Administration's consistent position that competition, rather than regulation, creates the most substantial benefits for consumers and the greatest opportunities for American industry. Television viewers will be best served by removing barriers to entry by new firms into the video services marketplace. The Administration, therefore, supports removal of current legislative prohibitions against telephone company provision of video programming, with appropriate safeguards.

The Administration also objects to the draft bill because it would greatly expand regulation of cable rates. It would require regulation of cable systems by either the Federal Communications Commission (FCC) or local government. In this respect the new regulatory regime would be even more intrusive than that which prevailed prior to the 1984 Cable Act, when regulation of cable systems was permitted but not required at either the local or federal level.

The number of cable systems and variety of cable programs have grown dramatically in the absence of extensive rate regulation. Reimposing such regulation would both hamper the development of new products and services for cable subscribers and slow the expansion of cable service to areas not now served.

The Administration also opposes the provisions of the draft bill that would restrict the discretion of cable programmers in distributing their product. Exclusive distribution arrangements are common in the entertainment industry and encourage the risk-taking needed to develop new programming. Requiring programming networks that are commonly owned with cable systems to make their product available to competing distributors could undermine the incentives of cable operators to invest in developing new programming. This would be to the long-term detriment of the American public. If competitive problems emerge in this area, they can and should be addressed under the existing antitrust laws.

Additionally, the draft bill would require cable operators to carry the signals of certain local television stations, regardless of whether the operator believes that the stations are appropriate for inclusion in its package of services, and regardless of whether such inclusion reflects the desires and tastes of cable subscribers. In the Administration's view, such "must carry" requirements would raise serious First Amendment questions by infringing upon the editorial discretion exercised by cable operators in their selection of programming. The draft bill would also give television stations the option to choose "must carry" or to require that a cable operator obtain the station's consent to retransmit its signal. This provision, however, does not address the serious First Amendment concerns noted here. While the Administration supports retransmission consent (without must carry), this should be coupled with repeal of the cable compulsory license.

Furthermore, the Administration opposes Section 16 of the draft bill, which would restrict foreign ownership of U.S. cable systems, as well as cable relay systems, multipoint distribution services, direct broadcast satellite services, and other programming-related services. Such a restriction invites retaliation by other nations that could stifle the growing investment of U.S. firms in foreign cable systems and could hinder U.S. efforts to open foreign markets. These provisions would violate existing international obligations under the Organization for Economic Cooperation and Development's Code of Liberalization of Capital Movements. Also, they could undercut U.S. efforts to liberalize trade in services in the General Agreement on Tariffs and Trade.

In addressing any concerns about the cable industry, the task for policymakers is to do so in a way that does not jeopardize the substantial benefits that the cable industry has produced for consumers since passage of the 1984 Cable Act. The Administration is convinced that this task is best accomplished by increased competition and not by legislating more costly, burdensome, and unnecessary government rules. Additional Government regulations would stifle investment, reduce consumer choice, and conflict with the President's efforts to deregulate and stimulate the economy.

We have been advised by the Office of Management and Budget that there is no objection to the submission of these views to the Congress, and that enactment of this cable television bill in its current form would not be in accord with the program of the President.

Sincerely,

Barbara Hackman Franklin
Secretary of Commerce

William P. Barr
Attorney General